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IN THE

Supreme Court of the United States

October Term, 1958.

No. 169

GROCERY DRIVERS UNION LOCAL 848, ETC., *et al.*,
Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INC.,
Appellee.

On Appeal From the Supreme Court of the State of California.

APPELLANTS' REPLY TO MOTION TO DISMISS APPEAL.

JOHN C. STEVENSON,
CLARENCE E. TODD,
CHARLES K. HACKLER,
1616 West Ninth Street,
Los Angeles 15, California,
Attorneys for Defendants and Appellants.

HERBERT M. ANSELL,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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The sole reason for this reply is to correct erroneous references to the record below contained in Appellee's Motion to Dismiss and thereby avoid the necessity for this Court to examine the voluminous transcript.

Appellee has suggested, if not directly stated, that the instant case was decided at the state level on a theory of union violence. At pages 3 and 4 of its Motion to Dismiss, reference is made to testimony of alleged threats of violence occurring *seven years prior to the initiation of the instant case.* This alleged violence was the basis of a completely separate court action entitled: *American Union Alliance, etc., et al. v. American Federation of*

Labor, etc., et al., filed in the Superior Court of Los Angeles on *April 1, 1942* under case number 474935. Appellee's Exhibit 31 referred to on page 3 and 4 of the Motion includes the record proper of the 1942 separate and independent action. (Neither party has designated this Exhibit as part of the record on this appeal, but Appellee apparently seeks to rely upon it.) Appellee's assertion that the trial court in that case found that Appellants had made threats of violence is completely in error. In that case, the company union sought a preliminary and permanent injunction against Appellants and other unions on the theory of violence. The trial court on April 30, 1942 denied the application for preliminary injunction and on September 2, 1942, after a trial on the merits, entered a judgment of dismissal of the action and awarded costs of suit to the defendant unions.

The remaining assertions of violence found on page 4 of Appellee's Motion to Dismiss concern testimony of one company witness (Landin) as to happenings in *1942*. Nowhere in the present record does there appear any evidence or findings that violence or threats thereof occurred in the instant case. Furthermore, the present complaint does not allege any violence. The activities which are the basis of the *present action* filed in 1949 are completely disassociated from those occurring in 1942. The complaint in the instant case confines itself to activities occurring on and since June 9, 1949. [Clk. Tr. p. 6.] Moreover, counsel for Appellee stipulated during the trial that damages were not being sought for any activities occurring prior to 1949. [Rep. Tr. p. 146, line 19, to p. 147, line 10.]

At pages 8-11 of Appellee's Brief, it is contended that Appellants are foreclosed from appealing a final damage

award because of their failure to appeal to this Court from an earlier decision of the California Supreme Court reported at 40 Cal. 2d 368, 254 P. 2d 544. The earlier decision on its face shows that the Supreme Court reversed and remanded the *entire* case for trial on the merits of both the damage and injunctive aspects of the complaint. The State Supreme Court thus reversed the trial court which had sustained a demurrer to the complaint on the theory that the Jurisdictional Strikes Act was unconstitutional. The present appeal is from the *final award of damages after trial on the merits.* Obviously there was no final dispositive decision of the California Supreme Court in the earlier appeal on any aspect of the case.

At page 9 of the Motion to Dismiss, Appellee cites authority for the principle that judgments are not final for review purposes where something non-ministerial remains to be done by the trial court. These principles themselves clearly dispose of Appellee's "timeliness" contention with respect to the California Supreme Court decision of the prior appeal.

Appellee next suggests, if it does not seriously contend, that the present State Supreme Court award of damages is not reviewable because it is not "final". In this connection, Appellee concedes on pages 10 and 13 of its Motion that the *damage award is final* and not subject to any further action by the Supreme Court or any other court of California. Appellee appears to contend that because the injunctive aspect of the case has been remanded to the lower court for the taking of additional evidence, this deprives Appellants of the only opportunity which the law gives for appeal to this court of the damage aspect of the case. No cases are cited for such an extreme proposition which, if accepted by this Court, would deprive

litigants of rights of appeal conferred upon them by Title 28, United States Code, Section 1257(2). Stated shortly, the right of review would be lost with respect to any *final* awards of damages merely because some other separable aspect of the case may require further trial proceedings in the state court system. The California Supreme Court clearly treated the damage award as *separable* and *distinct* from the injunctive phase of the case and rendered a *final judgment* with respect to one and remanded the other.

Finally, Appellee contends that a Federal question has not been raised because the existence of interstate commerce is not shown on the record. In this connection, reference is made to the Jurisdictional Statement, pages 5-6 and pages 17-19 for a complete review of the timely efforts made by Appellants to prove interstate commerce affectation and the trial court's refusal to permit this proof. This situation is analogous to that before this Court recently in *Lambert v. California*, 2 L. Ed. 228, 231. In that case, the defendant was prosecuted under an ordinance making it unlawful for a convicted felon to remain in Los Angeles County for more than five days without registering. At the trial, the defendant offered proof that she lacked actual knowledge of the registration requirement and the trial court rejected this proof. In holding that the ordinance as applied in this case was unconstitutional, this Court stated:

> "We must assume that Appellant had no actual knowledge of the requirement that she register under this ordinance, *as she offered proof of this defense which was refused.*" (Emphasis added.)

This Court then held that the ordinance as applied to one *not having actual knowledge* was unconstitutional.

The analogy is patent. In *Lambert*, this Court for purposes of review assumed the existence of facts giving rise to the Federal question when proof of such facts was offered and refused at the trial level. In the instant case the Court should apply the same rule.

Respectfully submitted,

JOHN C. STEVENSON,
CLARENCE E. TODD,
CHARLES K. HACKLER,
Attorneys for Defendants and Appellants.

HERBERT M. ANSELL,
Of Counsel.